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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CERTIFICATE OF SERVICE

I, James W. Hopper, hereby certify that on this 24th day of January, 1985, I served by first class mail copies of Andrew Williams' Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon counsel for Petitioner, Stephen A. Saltzburg, Esquire, Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901.

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QUESTIONS PRESENTED

1. Whether the En Banc Court of Appeals' holding that the Petitioner's Bodily Injury Occasioned by simple negligence is not a liberty interest protected by the due process clause is consistent with this Court's underlying rationale in Parratt v. Taylor.

2. Whether the Court of Appeals unanimous holding that assuming liberty deprivations receive constitutional protection, Parratt v. Taylor is applicable and respondent's suit would be barred under §1983 where the state provides a post-deprivation remedy, is wholly consistent with both Parratt and other circuits as well.

3. Whether the En Banc Court of Appeals' clear holding that a meaningful post-deprivation remedy exists under Virginia law because sovereign immunity is no defense to a claim against a public

official based upon simple negligence in the performance of a ministerial duty is consistent with this Court's holding in Parratt v. Taylor and Hudson v. Palmer.

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REASONS FOR DENYING THE PETITION

I. THE EN BANC COURT OF APPEALS' HOLDING THAT THE PETITIONER'S BODILY INJURY OCCASIONED BY SIMPLE NEGLIGENCE IS NOT A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE IS CONSISTENT WITH THIS COURT'S UNDERLYING RATIONALE IN PARRATT v. TAYLOR.

Parratt v. Taylor, 451 U.S. 527 (1981) decided that a deprivation of property could, under limited circumstances, give rise to a violation of the Fourteenth Amendment. The majority, however, expressed no opinion as to whether this rationale should extend to liberty interests. However, the Court of Appeals has very aptly noted that the Parratt Court "took pains to explicitly disavow construing its decision so that it might result in 'turning every alleged injury which may have been inflicted by a state official acting under 'color of state law' into a violation of the Fourteenth Amendment cognizable under

§1983.'" Daniels v. Williams, No. 82-6538, slip op. at 5 (4th Cir. Nov. 16, 1984)(citing Parratt, 451 U.S. at 544 (1981)).

By limiting Parratt to its factual setting, the Court of Appeals has accomplished the intent set forth in Parratt. The Parratt Court reasoned that, in holding the state officials conduct did not constitute a violation of the Fourteenth Amendment, it was preventing the Fourteenth Amendment from becoming "'a font of tort law to be superimposed upon whatever circumstance may already be administered by the States.' We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." Parratt, 451 U.S. at 544. (citation omitted)

An even stronger argument for limiting Parratt to its facts may be found in the second concurrence. Indeed,

Justices Blackman and White's concurrence in Parratt indicated that liberty interests were to be distinguished from property interests. Justice Blackman wrote that "I do not read the Court's opinion as applicable to a case concerning deprivation of life or liberty." Parratt, 451 U.S. at 545.

A majority of this Court in Logan v. Zimmerman Brush Co., while it could have expanded Parratt, 455 U.S. 422 (1982) cited Justice Blackman's concurrence with approval. Id. at 436. The Logan Court also specifically held that "Parratt was inapplicable to cases involving challenges to 'the state system that destroys a complanant's property interest, by operation of law . . . whether the . . . action is taken through negligence, maliciousness or otherwise.'" Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982)(citation omitted)(citing Parratt,

451 U.S. at 436).

These two factors led the Fifth Circuit in Brewer v. Blackwell to hold that Parratt should not be extended to liberty interests. The Brewer court held that "given the Court's citation of Justice Blackman's Parratt concurrence and the Court's narrow reading of Parratt in Logan, we decline to give Parratt the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case. Brewer, 692 F.2d at 395.

This court has had several opportunities to expand the Parratt doctrine to include liberty interests and yet it has refused to do so. Given this and the limiting language of the Parratt opinion itself the Court of Appeals' decision to limit Parratt to property interests is consistent with this Court's intentions.

II. THE COURT OF APPEALS' UNANIMOUS HOLDING THAT ASSUMING LIBERTY DEPRIVATIONS RECEIVE CONSTITUTIONAL PROTECTION, PARRATT v. TAYLOR IS APPLICABLE AND RESPONDENT'S SUIT WOULD BE BARRED UNDER §1983 WHERE THE STATE PROVIDES A POST-DEPRIVATION REMEDY, IS WHOLLY CONSISTENT WITH BOTH PARRATT AND OTHER CIRCUITS AS WELL.

The Court of Appeals' ruled that even if liberty interests were constitutionally protected, the Petitioner's §1983 suit would be barred if there was access to a post-deprivation remedy in the state courts. This rationale is consistent with the expressed intention of the Parratt Court and of other Court's of Appeal.

The Parratt Court indicated that where a deprivation of a constitutional right has been alleged, "[o]ur inquiry . . . must focus on whether the respondent has suffered a deprivation without due process of law. In particular, we must decide whether the tort remedies which the State . . . provides as a means of

redress for property deprivations satisfy the requirements of procedural due process." Parratt, 451 U.S. at 537. Therefore, so long as the state's system for redress meet the requirements of procedural due process, an action under §1983 may not be sustained. This is precisely what the Court of Appeals' has so reasoned in the case at bar.

Although the Fourth Circuit had not, until this case, had occasion to decide this specific issue, other circuits which have held that liberty interests do receive constitutional protection, have ruled that if a post-deprivation means of redress exists then an action under §1983 cannot be sustained. See e.g., Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984); Gilmer v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984); Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982); Rutledge v. Arizona Board of Regents, 660

F.2d 1345 (9th Cir. 1981); Junker v. Tinney, 549 F.Supp. 574 (D. Md. 1982).

The basic underlying rationale for allowing this post-deprivation proceeding is that a pre-deprivation hearing is impractical. Parratt, 451 U.S. at 540. The Parratt Court held that:

> The justification which we have found sufficient to uphold takings of property without any pre-deprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur.

Id. at 541.

In the case at bar, the State certainly has no policy condoning Respondent's acts. They may, looking at them in a light most favorable to the Petitioner, be characterized as random and unauthorized. Given this, allowing post-deprivation remedies to satisfy due

process is consistent with the underlying policy in Parratt.

If this Court should find that liberty interests do receive constitutional protection, certiorari should be denied in any event because the Court of Appeals has correctly ruled that a post-deprivation remedy satisfies due process.

III. THE EN BANC COURT OF APPEALS' CLEAR HOLDING THAT A MEANINGFUL POST-DEPRIVATION REMEDY EXISTS UNDER VIRGINIA LAW BECAUSE SOVEREIGN IMMUNITY IS NO DEFENSE TO A CLAIM AGAINST A PUBLIC OFFICIAL BASED UPON SIMPLE NEGLIGENCE IN THE PERFORMANCE OF A MINISTERIAL DUTY IS CONSISTENT WITH THIS COURT'S HOLDING IN PARRATT v. TAYLOR AND HUDSON v. PALMER.

Respondent is a peculiar breed of official in Virginia's hierarchy. The Respondent is not a state employee. Although the Virginia Supreme Court has yet to decide Respondent's precise relationship with the state, the Fourth

Circuit has held that for Title VII purposes, deputy sheriffs are not employees. See Petska v. T. C. Waddy, Sheriff, No. 82-0327-R (E.D.Va. July 9, 1982). Throughout Petitioner's Brief the Respondent is referred to as either a "state employee", a "state officer" or a "state official". The Respondent cannot be categorized as any of these. The Respondent is a duly appointed deputy of the sheriff. The sheriff is in somewhat of a paradoxical position as compared to traditional "state employees", "state officers", or "state officials". In one sense, he is regarded as an Officer of the Commonwealth of Virginia, Article VII, Section 4, Constitution of Virginia (1971), and his position has been so characterized by the Supreme Court of Virginia. As a constitutional officer, the Sheriff's "duties are regulated and defined by [State] statute," and not by

any county or municipality. Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957). On the other hand, the Sheriff may be regarded as an official of one of the Commonwealth's political subdivisions because the Sheriff is elected by the qualified voters of the county or municipality. The Sheriff's duties require wide latitude, however, and neither the Commonwealth nor the political subdivision has absolute control over his everyday operations. As a constitutional officer, the sheriff serves independent of the municipal or county government and independent of the state government. See Demier v. Arlington County, No. 80-1086-A, at 5 (E.D. Va. May 12, 1981). "[N]either the City of Richmond or the Commonwealth of Virginia is responsible for the actions of the Richmond Sheriff's Department, nor does the City or the State have any

control over the actions of the Sheriff of the City of Richmond." Sherman v. City of Richmond, 543 F.Supp. 447, 449 (E.D. Va. 1982)(interpreting the law of the Commonwealth).

The Sheriff is authorized and empowered to appoint deputies to assist him in the performance of his official duties. Those deputies are appointed pursuant to Virginia Code §15.1-48. The Respondent is such a deputy. Therefore, while the Respondent might be categorized as a deputy of a wholly local official elected by the qualified voters of the community, the duties of his principal are governed by state statute.

Petitioner contends that because the doctrine of sovereign immunity may apply, he will be cut off from a post-deprivation remedy. This occurence will in turn, he contends, cause Parratt v. Taylor to become an empty concept. In

this case, these arguments by Petitioner are not valid.

This Court recently decided a similar case deriving from the Fourth Circuit, Hudson v. Palmer, 104 S.Ct. 3194 (1984). In a similar cause of action the Complainant in Hudson likewise claimed that because "relief under applicable state law is far from certain and complete, the state court might hold that petitioner . . . is entitled to sovereign immunity." Id. at 3205 (citation omitted)(emphasis added). The Hudson Court found this argument "unconvincing". The Court noted that "[t]he District Court and the Court of Appeals held that respondent's claim would not be barred by sovereign immunity." Id. In the case at bar, the District Court, the Court of Appeals' Panel and the Court of Appeals sitting en banc held that the doctrine of sovereign immunity would not apply and

that, therefore, Petitioner would have access to a meaningful post-deprivation remedy.

Although Hudson v. Palmer involved an intentional tort for which the Virginia Supreme Court has given specific guidance regarding sovereign immunity, it is clear that where a negligent act is involved, the doctrine of sovereign immunity may still not apply.[1]

The Virginia Supreme Court in First Virginia Bank v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983) held that if an act or omission of simple negligence is committed in the performance of a ministerial task, sovereign immunity will not be a shield to a subsequent cause of action.

The defendant in First Virginia Bank

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[1]For an overview of the status of Virginia's doctrine of sovereign immunity see, Messina v. Burden, ___ Va. ___, 321 S.E.2d 657 (1984) (Va. Oct. 12, 1984); James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980).

was a clerk of the circuit court who was a constitutional officer of the Commonwealth of Virginia. The clerk had been sued because of the actions of one of the deputies in her office. The deputy clerk in First Virginia Bank, like the Respondent in the case at hand, was a deputy of a constitutional officer. Both the clerk of the court and the office of sheriff derive their authority from state statute. The Court of Appeals found "no significant difference in the duties of the deputy sheriff in this case, . . . and the deputy clerk of the court in Baker." Daniels v. Williams, No. 82-6538 slip op. at 9. In any case the Court of Appeals found that sheriff's and their deputies were held to a standard of ordinary care. Id. at 9 n.5.

In this case, in three separate proceedings, the District Court, the Court of Appeals' Panel and the Court of

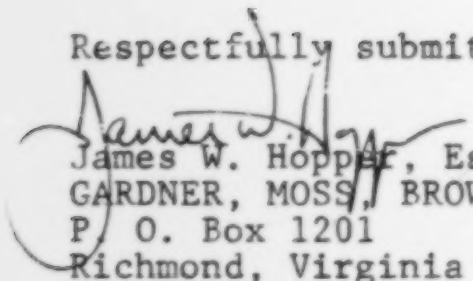
Appeals en banc have ruled that the doctrine of sovereign immunity would not be a bar to a state cause of action. Given this definitive ruling, it cannot be more clear that Petitioner has access to a post-deprivation remedy. This clarity underlies this Court's opinion in Hudson v. Palmer.

CONCLUSION

Because Respondent believes that the Court of Appeals' holding -- that Respondent's bodily injuries did not give rise to a constitutional deprivation and because assuming arguendo that these injuries did give rise to a constitutional deprivation Respondent is afforded adequate remedy in state courts -- is consistent with prior decisions of this Court, he respectively asks this Court to deny a Writ of Certiorari to the United

States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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